Supreme Court, U.S.
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No. 07-999

IN THE

Supreme Court of the United States

FRANKLIN R. PERKINS, PETITIONER

v.

MICHAEL W. WYNNE, UNITED STATES OF AMERICA, EX REL., SECRETARY, DEPARTMENT OF THE AIR FORCE; ALLEN B. DECKER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Frank Perkins filed a lawsuit against Tinker Air Force Base and his supervisor, Allen Decker after Decker demoted Mr. Perkins from his probationary position as a supervisor. As justification for demoting Mr. Perkins, Allen Decker, who was newly supervising him, instigated an unscheduled *ad hoc* performance review on October 9, 2002, and gave Mr. Perkins all "zeroes" for traits such as "communication skills." Mr. Perkins, an African American, is a decorated war hero, worked for a NATO General, and had never been disciplined either in military or civilian employment. He has previously been responsible for negotiating multi-million contracts for the Air Force. Decker's comments on the review form indicate subjective conduct issues, which Decker identified thirty days later as reasons for removing Mr. Perkins from the position. Mr. Perkins's performance reviews immediately prior to, and immediately after Decker's negative review, reflect the highest marks for Mr. Perkins, completely contradicting Decker's review, and indicating manipulation of performance data. The District Court found that Mr. Perkins suffered an adverse employment action at the hands of Decker. (App.14a). However, Mr. Perkins did not receive notice or an opportunity to be heard regarding the demotion.

Thirty days after giving Mr. Perkins the glaring negative performance review, on November 7, 2002, Decker handed him a written letter of demotion, to become effective November 17, 2002. This letter misdirected Mr. Perkins regarding administrative appeal of the matter in the short time before his removal. The District Court found that due to the misinformation in that letter, evidence exists on the record Mr. Perkins was "actively misled" prior to being demoted. This finding is

not disturbed on appeal. (App.29a).

Although Defendants argued to the Tenth Circuit that the October 9, 2002 *ad hoc* performance review was a "proactive attempt to inform Plaintiff of his deficiencies," (Appellee Brief p. 20), discovery produced an email wherein Decker and a higher supervisor had apparently planned and orchestrated Mr. Perkins' removal in September of 2002, prior to the negative performance review. (App.36a). Furthermore, another of Decker's supervisors instructed him in October of 2002 not to utilize subjective conduct criteria in critiques of employees, using the word "segregate" in such email. (App.44a). Nevertheless, Decker relied upon his subjective conduct criteria in his November 7, 2002 letter of demotion.

Immediately after delivering the termination letter to Mr. Perkins, and not knowing Mr. Perkins was nearby within earshot, Decker ***while laughing*** stated to a co-worker in referencing the termination, "the dirty deed is done." Applt. App. at 179, ¶ 14, at 249, ¶ 6. Decker admitted to having stated these words in his deposition, and Defendants have never countered this blatant statement of bias. Mr. Perkins pointed out these and other genuine issues of material fact on the record below, evidencing pretext or a "sham" reason for termination. The District Court granted summary judgment based on the fact that Mr. Perkins did not present direct evidence of discrimination. The Tenth Circuit upheld that decision.

Both the District Court and the Tenth Circuit did not address the record as a whole, which contained numerous issues of material fact. Although the District Court said on page 6 of its Order "Plaintiff admits he did not hear Decker use any specific racial terms" (App.17a), it should have interpreted Decker's above statement and

acts as evidence of the employer's racial animus. Decker's statement "the dirty deed is done," delivered in the manner described above, creates genuine doubt as to Defendants' real motivation and sincerity in terminating Mr. Perkins, and it clearly reveals the Defendant employer's underlying discriminatory motive. The other compounding factors, such as Decker's planning of the removal, his failure to abide by an order not to utilize conduct criteria in disciplining an employee in a performance review, and his misleading statement in the letter of demotion regarding Mr. Perkins' ability to appeal the matter, *in toto*, amount to an overwhelming amount of circumstantial evidence of animus. As such, a strong inference of discrimination remains on the record, regarding the employer's proffered reason for terminating Mr. Perkins, evidencing pretext.

Mr. Perkins has established a prima facie case of discrimination, has introduced enough evidence for a jury to reject the defendant employer's proffered explanation as "sham," and has produced additional evidence pointing to underlying animus on the part of Defendants. This appeal therefore focuses upon the second and third parts of the *McDonnell Douglas* test. *McDonnell Douglas v. Green*, 411 U.S. 792, (1973).

Questions presented:

Whether the District Court and the Tenth Circuit improperly applied the *McDonnell Douglas* test, and the holding in *Reeves v. Sanderson*, when they both concluded that the Plaintiff failed to show direct evidence of discrimination as their main reason for upholding summary judgment.

Whether under Rule 56, the District Court and Tenth

Circuit failed to view the record as a whole in a light more favorable to the non-movant, given the unique facts of this case and the numerous genuine issues of material fact on the record.

Whether Frank Perkins met his burden of proof and demonstrated pretext by presenting evidence that indicated Defendants: (i) orchestrated his removal in a way that circumvented his due process rights; (ii) presented inconsistent, contradictory material sworn statements relied upon by the Courts below; (iii) wrongfully manipulated his performance scores in order to remove him, (iv) made conversational comments on the record that a jury could interpret as evidence of animus, using words such as "segregated" and laughingly calling Mr. Perkins' removal a "dirty deed done," and (v) misstated the context of statements by Petitioner regarding the removal letter "appearing to comply" with administrative requirements, and upon which the District Court and Tenth Circuit relied.

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PETITION FOR A WRIT OF CERTIORARI

Frank Perkins, an individual civilian employee of Tinker Air Force Base, and a decorated veteran of the armed forces, respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on August 15, 2007, as it contradicts the Supreme Court's holding in *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, at 146-52(2000)(stating that an employee need not introduce independent evidence of discrimination beyond the prima facie case). In *Reeves*, the Supreme Court unanimously held that the Circuit below had ignored crucial evidence favorable to the employee, confined its review inappropriately, and that the respondent was not entitled to summary adjudication under the particular circumstances presented. *Id.* at 135. The Court further found that the Fifth Circuit had disregarded evidence that undermined the employer's non-discriminatory explanation, had failed to draw all reasonable inferences in favor of the employee, and had improperly given weight to the fact that no direct evidence of discrimination was proffered beyond the prima facie case. *Id.*

The Court is squarely presented with a holding from the Tenth Circuit that contradicts Rule 56, and contradicts the *Reeves* decision regarding the fact a plaintiff need not present direct evidence of discrimination in a *McDonnell Douglas* burden shifting framework. As such, the Tenth Circuit in its decision in *Perkins v. Wynne et al*, appears to adopt the "pretext plus" test that the Fifth Circuit inappropriately applied in the *Reeves* case. Given the facts in this case, the Court should set aside the Tenth Circuit's decision

affirming of summary judgment, and remand the matter for a trial on the merits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is dated August 15, 2007, and it is not published in the Federal Reporter, but is published at *Perkins v. Wynne ex rel Secretary, Dept. of Air Force*, 245 Fed.Appx. 771, 2007 WL 2319115 (C.A.10 (Okla.)). (App.1a). The order denying the Defendant Agency' first Motion for Summary Judgment of District Judge Vicki Miles-LaGrange, United States District Court for the Western District of Oklahoma in which the District Court found that the Defendants "actively misled" Plaintiff (App.29a), unpublished, is dated March 31, 2006. (App.19a). The order of Judge Miles-LaGrange granting Defendants' Motion for Summary Judgment, not reported in F.Supp.2d, but available at 2006 WL 2583760, is dated September 6, 2006. (App.10a).[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 15, 2007. A Petition for Rehearing and Petition for Rehearing En Banc was timely filed and was denied on October 25, 2007. (App.31a). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

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[1] References to the Appendix to this Petition are in the following format: "_a." References to the Tenth Circuit Appendix are in the format: "Applt.App. at _."

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The statute construed is 42 U.S.C. § 2000e-2(a) which states:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

STATEMENT

This case arises out of Mr. Perkins suffering an adverse employment event, and demonstrating under *Reeves v. Sanderson* that he has satisfied the third prong of the *McDonnell Douglas* test, by showing the proffered explanation was "sham." Mr. Perkins was promoted effective June 30, 2002 from his position as an Industrial Engineering Technician, GS-895-11 to a supervisory position as Planning Section Chief, GS-895-12 at Tinker Air Force Base, civilian sector, where he has worked for almost twenty (20) years. This promotion required him to serve a probationary period of one (1) year. He had been selected for this promotion by a panel chaired by Garry Bostick, a Black male, his then immediate supervisor. Shortly before the promotion, in April of 2002, Mr. Perkins had scored

"excellent" ratings on his performance evaluation.[2] (App.37a). Up until this promotion, Mr. Perkins' employment records demonstrated that he met all expectations of his employer, with favorable employment evaluations.[3]

Within two months of his promotion, in mid-August 2002, Mr. Perkins came under the immediate supervision of Allen Decker (Caucasian), branch chief. It was at this time his employment difficulties with Defendants began. Decker had an argument with Mr. Perkins the first day they met, when Mr. Perkins accidentally parked in Decker's parking space. Decker never outlined his expectations for Mr. Perkins, (Applt.App. at 249), and admitted he did not know whether Mr. Perkins' previous supervisor had drafted a "position description" or "performance plan" for Mr. Perkins' new supervisory role. Applt.App. at 234. Also, Decker indicated he had failed to complete a requisite agency "CORE" personnel document listing Mr. Perkins' duties and that such document "did not become official for Frank [Perkins]." Applt.App. at 231-235. He also identified an incomplete Performance Plan for Mr. Perkins' supervisory job. Applt.App. at 243.

Decker was hostile and impatient with Mr. Perkins, and within several weeks of supervising Mr. Perkins, Decker commenced actively soliciting negative

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[2] The highest score on the evaluation is 9, and Mr. Perkins scored one 7, five 8's and three 9's on the following appraisal factors: work effort, adaptability to work, problem solving, working relationships, communications, work productivity, self-sufficiency, skill in work, and work management.

[3] Mr. Perkins spent twenty years in the military, is a decorated veteran of the Vietnam War, and worked for a NATO General. He has spent almost twenty years in civilian duty, and has never been reprimanded or disciplined until this matter.

comments from other employees about Mr. Perkins. Applt.App. at 249-250. Discovery in this case produced an email between Decker and his superior Linda Thomas (Caucasian), dated September 27, 2002, where the two planned to remove Mr. Perkins from his position without giving him due process, thirty days after a performance review. (App.36a). That email also referenced subsequent meetings between the two to further discuss removing Mr. Perkins.

Two weeks after the planning email with Thomas, on October 9, 2002, Decker conducted a subjective *ad hoc* performance review, without giving notice to Mr. Perkins (seven weeks after the incident over the parking space). On that date, Decker presented an Evaluation Form 860B that indicated Mr. Perkins was completely deficient in all areas, amounting to "zeroes." (App.32a). Unlike any performance review he had ever received in his decades of public service, and certainly contrary to the last evaluation in April 2002 (App.37a), On October 9, 2002, Mr. Perkins received the lowest possible ratings in every category with vague criticisms and inaccurate assessments of his performance. (App.32a-33a).[4] The "comments" section of the review form indicate that Decker focused upon Mr. Perkins' conduct, and not upon his performance of identified duties.

In email dated October 16, 2002, Charlotte Corcoran, another Caucasian superior of Decker's, instructed Decker, prior to his letter terminating Mr.

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[4] Among others, Decker's "comments" section includes nonsensical requirements for improvement, drafted in an unprofessional, almost childish manner, lacking specificity, and manifesting pretext: "need a major adjustment in dealing with others"..."ask questions but manner of questions is paramount!"

Perkins, not to utilize conduct criteria in performance evaluation reviews. Applt. App. at 220. In her email, Ms. Corcoran states that performance matters and conduct matter must be "segregated." (App.44a); Applt.App. at 220. Decker disobeyed this order and on November 7, 2002 drafted a removal letter relying on subjective conduct criteria from the performance review, in terminating Mr. Perkins. Applt. App. at 215. Defendants have not explained why Decker utilized inappropriate conduct issues to terminate Mr. Perkins.

Decker asserts on the October 9, 2002 review (App.35a) in Duty 7, item 5 that Mr. Perkins "did not complete" and "botched" a program called 135 SORAP. However, an email chain between Decker and other supervisors dated October 2, 2002 indicates the opposite: that Mr. Perkins successfully completed the project, and to Decker's satisfaction. Applt.App. at 217. In fact, in one email, Decker states that he is "please[d] with the [135 SORAP] numbers" and that Mr. Perkins "worked out a compromise." Applt.App. at 217, and at 250. Neither the District Court, nor the Tenth Circuit, applied this amazing contradictory evidence in a light more favorable to Mr. Perkins, apparently discounting it as inapplicable. *See* Fed. R. Civ. P. 56; *Reeves*, *supra* at 135 (directing that Courts not weigh evidence, and that the evidence on record be analyzed in light more favorable to the nonmovant).

On November 7, 2002, exactly thirty (30) days after the performance review,[5] Decker relied upon the

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[5] Decker acted according to the time frame referenced in the planning email of September 27, 2002 with Thomas (App.36a), handing a notice of removal of Mr. Perkins from his position exactly thirty days after the unscheduled *ad hoc* performance review.

same derogatory criteria he had created in the 860B review Form and handed Mr. Perkins a letter removing him from his supervisor position and demoting him effective November 17, 2002. Applt.App. at 215. Decker did not give Mr. Perkins notice or opportunity to be heard prior to delivery of the November 7, 2007 letter. Interestingly, in its Order granting summary judgment, the District Court found that Mr. Perkins' removal amounted to an "adverse employment action." (App.14a). Employees who suffer adverse actions are entitled to due process, and notice of the adverse action in advance. *Montgomery v. City of Ardmore*, 365 F.3d 926, at 936-37 (10th Cir. 2004)(employer should provide charges, summary of employer's evidence, and an opportunity to respond); *see also* 5 U.S.C. § 2302. However, Decker acted according to the planning email of September 27, 2002, which laid out a strategy to terminate Mr. Perkins from his position without giving him notice. (App.36a).

In the November 7, 2002 removal letter, Decker specifically guided Mr. Perkins to seek appeal remedy under AFI 36-1203, an inapplicable regulation that specifically excludes relief for individuals such as Mr. Perkins. Applt.App. at 215, and at 86-92 Section 14.10. Decker never informed Mr. Perkins that he had forty-five (45) days in which to contact an EEOC counselor. Applt.App. at 249. Immediately after delivering the termination letter to Mr. Perkins, and not knowing Mr. Perkins was nearby within earshot, Decker ***while laughing*** stated to a co-worker in referencing the termination, "the dirty deed is done." Applt. App. at 179, ¶ 14, at 249, ¶ 6. Decker admitted to stating these words in his deposition, and Defendants have never countered this blatant statement of bias and pretext.

Mr. Perkins was qualified for the supervisor position, but was removed under circumstances that support a claim of racial discrimination. Defendants claim that Mr. Perkins did not communicate well verbally or in writing and that his communications were often difficult to understand as unnecessarily complex, wordy, and overly rhetorical. Applt.App. at 124. Defendants misrepresented to the Tenth Circuit that the October 9, 2002 performance meeting was a "proactive attempt to inform Plaintiff of his deficiencies," (Appellee Brief p. 20). The email of September 27, 2002, where Decker and Thomas were planning Mr. Perkins' termination, proves the existence of Defendants' otherwise ulterior pretextual motive to remove Mr. Perkins from his job completely, not to rehabilitate him. Applt. App. at 195.

Furthermore, after Mr. Perkins was demoted, he underwent another performance evaluation on April 4, 2003, where he received higher marks than the one before the adverse event with Decker on October 9, 2002. (App.40a). On the April 4, 2003 performance review, Mr. Perkins received an "8" (with "9" being the highest) in "Communication" from reviewer Charlotte Corcoran, who comments: "***communicates clearly and effectively, whether orally or in writing***." Applt. App. at 199-200 (emphasis added). The overpowering discrepancy between a "zero" on the review at the adverse employment action, and a near perfect score of "8" in employee performance reviews less than six months apart, on the ability to communicate effectively, gives rise to an inference of pretext, and that Decker manipulated performance data on October 9, 2002. *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, at 1168 (10th Cir. 1998)(stating that employee may show pretext by (1) showing the adverse

event does not accord with proper criteria utilized by the employer, (2) by adducing evidence that the employer's criteria was deliberately falsified or manipulated so as to adversely alter the employment status, or (3) by adducing evidence that the employer's action is generally pretextual).

In April of 2003, Mr. Perkins contacted an EEOC counselor regarding matters of concern in this action. On May 14, 2003, Mr. Perkins filed an informal EEOC complaint and on July 21, 2003, filed a formal EEOC complaint citing the October 2002 evaluation and November 2002 demotion. He received a "right to sue letter" from EEOC and filed this lawsuit in 2004, alleging discrimination under Section 1981, the Fifth Amendment, the Fourteenth Amendment, and Title VII of the Civil Rights Act (42 U.S.C. § 2000e et seq). The District Court dismissed Mr. Perkins' § 1981, Fifth and Fourteenth Amendment Claims in February 2005. Thus, the sole remaining claim is under 42 U.S.C. § 2000e-2(a).

Defendants moved for Summary Judgment in July 2005 partly on the grounds that Mr. Perkins failed to commence his EEOC process in a timely fashion. That motion was denied specifically because the Court found evidence that the Defendants "actively misled" Mr. Perkins with regard to his rights to appeal the adverse event. (App.29a). The Court entered an Order on March 31, 2006 that equitable tolling of EEOC deadlines was in order, and granted Perkins the opportunity to maintain his remaining claim.

Defendants then moved again for Summary Judgment on Mr. Perkins' remaining employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964. In its Order of September 6, 2006, the Court focused solely on the three-prong *McDonnell*

Douglas test. The Court found Mr. Perkins satisfied the first prong and established a prima facie case of discriminatory discharge. It then held that Defendants articulated a legitimate, non-discriminatory reason for terminating Mr. Perkins, overcoming their burden under the second prong of the test. Under the third prong, the District Court felt that Mr. Perkins did not demonstrate pretext as he was replaced by a Hispanic person and, among other matters, Mr. Perkins could not cite to direct evidence of racism. The District Court stated in its Order that "Plaintiff admits he did not hear Decker use any specific racial terms." (App.17a). In granting the Defendants' second Motion for Summary Judgment the District Court states Mr. Perkins "failed to show any inconsistencies or contradictions in Defendant's proffered," without taking into consideration numerous contradictory facts on the record. (App.17a). In its Order, however, the District Court did not set aside its prior finding that Defendants actively misled Perkins. (App.10a).

One key point the District Court misinterpreted is a statement it cited from Mr. Perkins, where he states on the record that the demotion letter of November 7, 2002 "appears to comply with" administrative protocols. (App.16a-17a). Defendants misguided the Court, as the sentence, when read in full context of the preceding sentence, and the following two paragraphs, clearly demonstrates that Plaintiff is stating that although Decker's letter ***appears*** appropriate, in truth it is not. When read in context, that sentence should be properly understood as follows:

> Exhibit 13 is the ***attempt*** by Decker to comply with AFI 36-1001, paragraph 4.7. ***The letter appears to comply with the***

> ***requirements***...according to his deposition, Decker failed to establish a core personnel document... Applt.App. at 186-87. (emphasis added).

Mr. Perkins filed an appeal with the Tenth Circuit, which corroborated the District Court's analysis that the record lacked direct evidence of discrimination, and that Mr. Perkins therefore did not prove pretext. (App.7a). The Tenth Circuit validated the same statement above that the District Court took out of context, regarding Mr. Perkins' argument that although Decker attempted to comply with administrative requirement with his demotion letter, he did not, as he had not identified proper core duties for Mr. Perkins. (App.6a). The three-judge panel did not read the full context of that sentence, and therefore did not view it properly in a light more favorable to Mr. Perkins, and instead based its approval of summary judgment on its misinterpretation. Fed. Civ. R. P. 56. The Tenth Circuit apparently did not review any of the contradictory evidence favoring Mr. Perkins, as it must have believed it inapplicable for some reason.

The Tenth Circuit affirmed the District Court's grant of summary judgment On August 15, 2007. (App.1a). A timely Petition for Rehearing and Petition for Rehearing En Banc was denied. (App.31a). This Court should now consider the Petitioner's claim that the Respondents are not prevailing parties in light of this Court's prior recent decision in *Reeves*, which held that an employee is not required to submit more evidence than (a) a prima facie case requires, coupled with (b) evidence from which a rational factfinder would conclude that the employer's proffered explanation for its actions was false. Mr. Perkins

submitted evidence on the record that both the District Court and the Tenth Circuit failed to recognize in a light more favorable to him, just as the plaintiff did in *Reeves*.

This Court should also review this case since the approach of the Tenth Circuit is inconsistent with the indirect evidence method of proof mandated by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973), and followed in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), *Hicks*, 509 U.S. at 502 (1993), and most recently *Reeves*, 530 U.S. 133(2000). The theory underlying *McDonnell-Douglas* and its progeny is that an employer in an employment discrimination case will not ordinarily admit employment discrimination. Because of the unavailability of direct evidence, this Court adopted the indirect burden-shifting method of proof. Requiring direct evidence (i.e., "pretext plus") cannot be reconciled with *McDonnell-Douglas* and its progeny, which hold direct evidence is not required. The Court is presented with the opportunity to set aside the Tenth Circuit's judgment and remand the matter to District Court for adjudication on the merits.

REASONS FOR GRANTING THE PETITION

A. The Tenth Circuit Decision in *Perkins v. Wynne et al.* is in conflict with the Supreme Court decision in *Reeves v. Sanderson*.

In a *McDonnell Douglas* burden shifting framework, the burden of the employer to produce a non-discriminatory reason for the adverse employment action is one of production, not of persuasion, and

should not involve a credibility assessment. *Reeves*, supra at 142, citing *Burdine*, supra at 254; 42 U.S.C.A § 200e-2(a)(1). On a motion for summary judgment, a Court should review all evidence in the record, but in doing so, must draw all reasonable inferences in favor of the nonmoving party, without making credibility determinations or weighing the evidence. *Reeves* at 150, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986). After the employer proffers a nondiscriminatory reason for an adverse employment action, a plaintiff need only produce sufficient evidence to reject the employer's explanation, and need not introduce additional, independent evidence of discrimination. *Reeves* at 149. The Courts below found that Petitioner had successfully proven his prima facie case for discrimination. (App.14a, App.4a-5a). The District Court found that Mr. Perkins had suffered an "adverse employment action" (App.14a), and this finding was not disputed by the Tenth Circuit. However, the Courts below failed to consider evidence on the record that strongly contradicted the employer's proffered reason, and inappropriately weighed evidence in favor of defendants. As such, summary judgment should be set aside.

A wide deviation in scores from one employee performance review to another demonstrates proof of pretext and an inference that Defendants manipulated evaluation criteria, therefore precluding summary judgment. *Beaird*, supra at 1169-70.[6] The strongest

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[6] The *Beaird* case is not only on point, but was the Tenth Circuit case the Supreme Court analyzed for purposes of the split in circuits resolved through the *Reeves* holding. The *Reeves* holding supported the analysis in *Beaird* that employees be able to show through circumstantial evidence and other evidence that an

evidence on the record includes the performance reviews immediately before and after the performance review at the adverse event. (App.37a, App.40). The review on October 9, 2002 that Defendants utilized to demote Mr. Perkins, included all "zeroes" for each criteria, such as communications and working relationships with others. (App.32a). The Courts below adopted and even quoted in their orders the Defendants' biased evidence regarding the adverse event.[7] (App.5a, App.14a). Neither Court below addressed the glaring inconsistency between the Defendants' assessment of Mr. Perkins and the reviews right before and after October 9, 2002.

In stark comparison, the performance review in April 2002, six months before the review that supported the adverse event, indicates that Mr. Perkins scored the highest, a "9," on element number 4, and that he was "sensitive to the behavior of fellow workers, supervisors, and subordinates; maintains effective working relationships with others." (App.37a). This review also shows that on element 5, communication, Mr. Perkins scored an "8" and that he "communicates clearly and effectively; whether orally or in writing." Further damning is the performance review

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inference of discrimination is present, without requiring direct evidence.

[7] The Tenth Circuit quoted Defendants' brief that Mr. Perkins allegedly had "uncooperative demeanor, poor communication skills, and condescending, disrespectful manner of speaking." App.5a. This assessment of Mr. Perkins is contradicted in the record by both of Mr. Perkins's reviews before and after the adverse action (App.37a, App.40a), and contradicted in the record by emails showing Mr. Perkins communicating well with others. Applt.App. at 217-220, and at 248. The Tenth Circuit should have viewed this evidence in a light more favorable to Mr. Perkins, per Rule 56.

immediately after the October 9, 2002 review, where Mr. Perkins scored even higher on the same criteria than he did on the April 2002 review.[8]

As such, the Courts below either failed to view this evidence in Mr. Perkins' favor, or they disregarded it as not being direct proof of discrimination. Neither Court below discussed the incredible contradiction between the consecutive performance assessments. Furthermore, neither Court below explained the fact that Defendant Decker and another supervisor were emailing each other a plan to remove Mr. Perkins two weeks before Decker's October 9, 2002 performance review of Mr. Perkins, where Mr. Perkins received all "zeroes" (App.32a, Applt.App. at 193), and that Decker made the statement "the dirty deed is done," while rejoicing with another white supervisor upon terminating Mr. Perkins.[9] Applt. App. at 179, ¶ 14, at 249, ¶ 6.

Mr. Perkins has consistently argued on the record that Decker purposefully misled him with respect to the manner in which he could appeal his termination in the demotion letter. Applt. App. at 15 (¶13); at 23, 27-29; at 73 (¶B), and at 74 (¶1). He not

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[8] Whereas Mr. Perkins had scored a "7" on the April 2002 performance review for criteria number seven "skill in work," he scored an "8" in the same criteria in the April 2003 performance review with the following assessment: "performs job-associated tasks well, whether they require physical, technical, professional, ***supervisory***, or managerial skills, is considered very skillful on the job" (emphasis added). Both the April 2002 and April 2003 assessments, on the first page indicate Mr. Perkins also received a performance cash award for scoring so well on his performance criteria. Applt.App. at 197, at 199.

[9] The record indicates that Defendant Decker did not know Mr. Perkins was within earshot and overheard this conversation, and Decker admitted in his deposition to having said such comment.

only contradicted the Defendants' evidence, but also put forward this other evidence that rendered the Defendants' explanation for termination unworthy of credence. Mr. Perkins pointed to this evidence as proof of pretext, yet neither Court below distinguished this key evidence.

The District Court reasoned that summary judgment was proper due to the fact that Plaintiff did not identify any direct statements by Decker evidencing discrimination. (App.17a). The Tenth Circuit quoted the District Court's Order (App.5a), and mistakenly identified the *McDonnell Douglas* framework to require an employee to deliver independent evidence that the employer did not "honestly believe that explanation" for the adverse employment action. (App.7a). The statement by Decker "the dirty deed is done" should have been presented to a jury as it appears to meet the Tenth Circuit's own test.

The Tenth Circuit incorrectly limited its review of Mr. Perkins' proof of Defendants' pretext to four items. (App.5a). In truth, Mr. Perkins identified other independent issues of material fact on the record that support pretext, such as the evidence above, which was completely neglected by both Courts below. Summary Judgment was inappropriate, as the Tenth Circuit should have viewed the evidence in a light more favorable to Mr. Perkins, and determined that genuine issues of material fact exist, under Rule 56, and should not have given credibility to the Defendants' witnesses, and weighed evidence in their favor. Also, summary judgment should be set aside as Mr. Perkins should not have been given the gargantuan task of placing direct proof of discrimination on the record.

B. The Tenth Circuit's ruling upholding Summary Judgment fails to address numerous genuine issues of material fact highlighted on the record, that should have been viewed in a light more favorable to Petitioner

When determining whether summary judgment is proper, a Court should view the evidence in the light most favorable to the nonmoving party, and draw all reasonable inferences in that party's favor, and it should be denied upon proof of genuine issues of material fact. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

1. Contrary to the Tenth Circuit's finding, Mr. Perkins successfully completed the project called KC 135 SORAP

The Tenth Circuit improperly relied upon Defendant's statements that Mr. Perkins was fired for "botching" a project called KC 135 SORAP. (App.5a). In truth, Mr. Perkins successfully completed it, and to Defendant Decker's satisfaction. Defendant Decker misrepresented on the 860B October 9, 2002 performance review form and its attachment that Mr. Perkins "botched" the KC 135 SORAP project. Applt. App. at 194, duty 7, item 5. Regarding the KC 135 SORAP project, Decker states in an email:

> Yes ***Jimmie got in touch with Frank this afternoon and worked out compromise. I am please with the numbers*** and my planners will follow thru on rest of studies and actions

> ***Thank again***." (emphasis added). Applt. App. at 217-19, at 250 (email dated October 2, 2002).

Due to his satisfaction regarding Mr. Perkins' successful completion of it, it appears Decker fabricated the story he attached to the October 9, 2002 Performance Review 860B form that Mr. Perkins somehow "botched" this KC 135 project. This evidence was presented to the Court below and should have been resolved in Mr. Perkins' favor, and not construed against him on page 6 of the District Court's Order. (App.15a).

Mr. Perkins has consistently asserted that Decker's accusation regarding his "botching" the KC-135 SORAP project are unfounded. Applt App. at 178. A genuine issue of material fact thus exists as to whether Frank Perkins' work was deficient with regard to the KC-135 SORAP project, lessening the strength of Defendants' proffered reason under the second prong of *McDonnell Douglas* and supporting an inference of pretext. The Tenth Circuit should have viewed this evidence in a light more favorable to Mr. Perkins, and denied summary judgment.

2. The Tenth Circuit did not address the suspicious email between Defendants where they are planning to remove Petitioner without due process, as well as the misleading termination letter

The Tenth Circuit failed to address the fact that Defendants communicated a plan to terminate Mr. Perkins before his performance review, and expressed an interest in removing him without affording him due

process. Applt. App. at 195.[10] The email is suspect, as it identifies an organized, preplanned agenda by Decker to remove Mr. Perkins. Defendants' proffered reason for terminating Mr. Perkins due to alleged failure to perform his duties is thus questionable. On November 7, 2002, Defendant Decker acted upon this plan, and handed Mr. Perkins a termination letter with two glaring misrepresentations. Applt. App. at 215. First, the letter wrongly instructed Mr. Perkins that his termination "may not be appealed to the Merit System Protection Act," (Applt. App. at 215), although the law allowed him to do so. *See* 5 USC §7702(a); 29 CFR §1614.302; 5 CFR §§1201.151-1201.157; *Coffman v. Glickman*, 328 F.3d 619, 623-24 (10th Cir. 2003).

Secondly, the November 7, 2002 letter further misdirected Mr. Perkins to "contest this action under the Administrative Grievance system in AFI 36-1203 if you so desire." Applt. App. at 215, ¶ 3. However, AFI 36-1203, an Air Force regulation, does not pertain to removal of a probationary supervisor and in fact specifically contains an exception to such, as the Court below was made aware. Applt. App. at 117-18 (Court's Order citing the inapplicability of the regulation and proof of "evidence that [Mr. Perkins] was actively misled"), Applt. App. at 74-5, 79, and at 179, ¶15. Defendant Decker knowingly misled Mr. Perkins regarding his appeal rights.

As a general rule, the Due Process Clause requires "some kind of a hearing prior to the discharge

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[10] Linda Thomas emailed Decker on September 27, 2002, and suggested a manner of terminating Frank Perkins from his position without affording him due process. Applt. App. at 195. The Court below did not address this communication, which, coupled with the November 7, 2002 letter misleading Mr. Perkins about his rights to appeal the adverse event, manifests pretext.

of an employee who has a constitutionally protected property interest in his employment." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *see also* 5 U.S.C. § 2302. The purpose of the pretermination hearing is to serve as "a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-46. The District Court stated in its Order granting Summary Judgment that Frank Perkins had suffered an "adverse" employment action in being removed from his supervisory position. (App.14a). Mr. Perkins was not afforded a pretermination hearing. The Tenth Circuit should have viewed this evidence in Mr. Perkins' favor as well, as it strengthens the inference of pretext.

3. Defendant Decker had not conveyed to Mr. Perkins any expectations of his new duties as a supervisor, as required under agency protocol, and thus inappropriately punished Mr. Perkins through the performance review of October 9, 2002

Defendant Decker stated in deposition that a required CORE document defining Mr. Perkins' duties was not completed for purposes of holding a performance review on October 9, 2002. Applt. App. at 231-35. The Tenth Circuit should have considered this proof that Decker's *ad hoc* review was thus improper. Decker admitted that when conducting a performance review, he was required to follow Air Force protocol, and utilize a pre-drafted CORE personnel document that outlined an employee's duties. Applt. App. at 230-235. He faltered in his deposition and mixed his words

regarding the fact Mr. Perkins had not been properly given a set of performance duties under an appropriate CORE document. Applt. App. at 232-35 (Decker stating "[the CORE document] did not become official for Frank," Applt. App. at 233, and that "I was wanting to get Frank and I together to sign it," Applt. App. at 235). Decker's own testimony thus creates an issue of material fact as to whether his evaluation of Mr. Perkins was appropriately conducted with relevant criteria, and proper job duty expectations.

4. Petitioner was prevented from promoting two African American females, and chastised for disciplining a white employee, demonstrating further evidence of pretext for his removal

Mr. Perkins has argued on the record that management terminated him because he was attempting to discipline a white employee that Linda Thomas wanted to protect, and because he attempted to promote two black employees. Defendants never explained why they redrafted the selection criteria for a position that Mr. Perkins filled with an African American woman. Applt. App. at 184-85. Mr. Perkins identified on the record below that his promotion of one black female was set aside after the promotion occurred. Applt. App. at 250. Furthermore, Linda Thomas ordered Mr. Perkins to destroy documents he had drafted regarding a rogue white employee he was disciplining. Applt. App. at 176, at 201.

Mr. Perkins' managerial style as a supervisor was met with certain disapproval, and he has argued on the record that the Defendants maintain a prejudiced

bias against African Americans and thus actively sought to demote him. Applt.App. at 248. A genuine issue of material fact thus exists as to whether management was predisposed to prejudice, and the Tenth Circuit should have viewed this evidence as supporting proof of pretext for discrimination.

5. Defendant Decker utilized inappropriate conduct criteria in his performance evaluation of Mr. Perkins, contrary to Air Force protocol and contrary to regulatory law

Conduct issues are not proper reasons for removal from a supervisor position. Applt. App. at 179, 185-86, 192. Air Force Instruction 36-1001 at Section 4.7.2 states that a supervisor in probationary status may only be demoted for issues related to performance of his supervisory role, not for subjective issues of conduct:

> Return an employee to a nonsupervisory or nonmanagerial position for failing to complete probation ***only for reasons that relate directly to the employee's performance as a supervisor or manager***. This return is not an adverse action. Process actions to demote or separate for conduct or performance unrelated to supervisory or managerial performance under 5 CFR Part 432 or 752. Applt. App. at 185, at 192. (Emphasis added).

This directive identifies a completely separate disciplinary process for issues of conduct, found at 5

CFR Part 432 and 752. Decker knew or should have known not to discipline Frank Perkins on conduct issues in a performance evaluation, given his high-level supervisory position and the fact he had demonstrated his knowledge of regulatory law. Applt. App. at 54 (Declaration of Decker who cites to another section of Title 5 CFR); Applt. App. at 142 (Memorandum given by supervisors such as Decker, citing 5 CFR Section 315). Furthermore, Decker's own superior, Charlotte Corcoran, emailed him and told him not to use conduct criteria in a performance evaluation, before he delivered his November 7, 2002 removal letter to Mr. Perkins. App.44a.

At the performance review in question on October 9, 2002, Decker acted contrary to proper protocol: he criticized Mr. Perkins in an 860B Form (Applt. App. at 108-09) for subjective ***conduct*** matters not identified in a CORE document, and not related to ***performance*** (Applt. App. at 179, ¶14). Decker's biased, personal criticism of Mr. Perkins' conduct should have been addressed in a disciplinary hearing and not in a performance review, according to Air Force Instruction 36-1001, in effect during the relevant events at issue. Applt. App. at 177, 185, 190, 191, and 192 at § 4.7.2.

A Court should view evidence and all reasonable inferences in favor of the non-moving party. *Reeves, supra at* 150. The District Court's sidebar comment in its footnote 4 regarding Mr. Perkins' aptitude as a supervisor (Applt. App. at 260), repeated by the Tenth Circuit, shows that the Courts below failed to consider Mr. Perkins' evidence (Applt. App. at 85, at 186-87, at

197-200)[11] that he was satisfactorily performing his job, in a light more favorable to him, in violation of Fed. R. Civ. Proc. Rule 56. Furthermore, the Tenth Circuit failed to consider the remaining evidence that Defendants' proffered explanation was pretextual, and it inappropriately weighed evidence in favor of Defendants. As such, the Tenth Circuit should have viewed the record as whole, and determined that genuine issues of material fact remain. This Court should set aside summary judgment and remand the matter for a trial on the merits.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,
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[11] The record shows that Mr. Perkins had numerous important duties over the past several decades, and that the Air Force sent Mr. Perkins to remote areas across the United States to negotiate large contracts on its behalf. Applt. App. at 58-64. The Air Force's trust in Mr. Perkins' communication skills in allowing him to negotiate multi-million dollar contracts for years contradicts Decker's performance review, and the Tenth Circuit should have viewed this evidence in Mr. Perkins' favor.

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No. 06-6321
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
FRANKLIN R. PERKINS,
Plaintiff-Appellant,

v.

MICHAEL W. WYNNE, * United States of America, ex rel., Secretary, Department of the Air Force; ALLEN B. DECKER, individually and in his official capacity,
Defendants-Appellees.

August 15, 2007, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For FRANKLIN R. PERKINS, Plaintiff-Appellant: Robert L. Mitchell, Mitchell Foley & Jencks, Oklahoma City, OK; Alexander L. Bednar, Oklahoma City, OK.

For MICHAEL W. WYNNE, United States of America, ex rel., Secretary, Department of the Air Force, ALLEN B. DECKER, individually and in his official capacity, Defendants-Appellees: Robert A. Bradford, Asst. U.S. Attorney, Judy A. Copeland,

Office of the United States Attorney,Oklahoma City, OK.

JUDGES: Before HARTZ, EBEL, and TYMKOVICH, Circuit Judges.

OPINION BY: David M. Ebel

OPINION

ORDER AND JUDGMENT **

Plaintiff Franklin R. Perkins appeals from the district court's summary judgment order that he failed to present sufficient evidence to create a genuine issue as to whether the defendant's explanation for his demotion was a pretext for discrimination. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I

On June 30, 2002, Mr. Perkins, a civilian employee of the United States Department of the Air Force (Air Force), was promoted to supervisory industrial engineering technician. The promotion was subject to his successful completion of a one-year probationary period. Not long after the promotion, his relationship with his direct supervisor and other colleagues became strained. In October 2002, his direct supervisor, Allen Decker, conducted a progress review which indicated that he was performing poorly; however, Mr. Perkins refused to discuss the review and stated that he no longer wanted to work for Mr. Decker. In November 2002, Mr. Perkins was notified in writing that he had not passed the probationary period and would be

returned to his former position as a non-supervisory industrial engineering technician.

In his suit against the Air Force and Mr. Decker, Mr. Perkins claimed violations of 42 U.S.C. § 2000e ("Title VII"), 42 U.S.C. § 1981, and the Fifth and Fourteenth Amendments to the United States Constitution. The district court dismissed all of the claims against Mr. Decker and the § 1981 and constitutional claims against the Air Force. Mr. Perkins does not challenge this order on appeal.

The Air Force moved for summary judgment on the grounds that Mr. Perkins failed to timely exhaust his administrative remedies. In denying the motion, the district court found

> there is a genuine issue of material fact as to whether equitable tolling should apply to extend the forty-five (45) day time limit for [Mr. Perkins] to contact an EEO counselor. Specifically, the Court finds that [Mr. Perkins] has put forth evidence that he was actively misled.Aplt. App. at 118.

The district court, however, did grant the Air Force's second motion for summary judgment, holding that Mr. Perkins failed to meet his burden of demonstrating that the Air Force's explanation for his demotion was pretextual. This appeal followed.

II

"We review the district court's grant of summary judgment de novo, applying the same legal standard

used by the district court." *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence and reasonable inferences drawn therefrom are viewed in the light most favorable to the nonmoving party. Simms, 165 F.3d at 1326.

III

In cases such as this where a Title VII plaintiff relies on indirect evidence to prove discrimination, the claim is analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Young v. Dillon Cos., Inc., 468 F.3d 1243, 1249 (10th Cir. 2006).

> Under *McDonnell Douglas*, the plaintiff carries the initial burden of establishing a prima facie case of racial discrimination. Once the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the adverse employment action. If the defendant makes this showing, the burden then shifts back to the plaintiff to show that the defendant's proffered justification is pretextual.*Id.* (internal citations omitted).

Applying this framework, the district court assumed for purposes of summary judgment that Mr. Perkins

"established a prima facie case of discriminatory discharge," Aplt. App. at 260, and further found that the Air Force "met its burden to produce a legitimate, non-discriminatory reason for terminating [Mr. Perkins's] employment." *Id.* Among other things, it noted the Air Force's evidence of Mr. Perkins's "uncooperative demeanor, poor communication skills, and condescending and disrespectful manner of speaking to co-workers," *id.*, as well as the inappropriate reaction to his review, defensive response to negative feedback, unsatisfactory performance on a repair plan, and lack of skills and aptitude to be a supervisor.

The district court then turned to whether Mr. Perkins met his burden of demonstrating a genuine issue of material fact as to whether the Air Force's explanation for his demotion was a pretext for discrimination. In this regard, Mr. Perkins advanced four theories: (1) he was replaced by a non-African-American; (2) another African-American employee was removed as a supervisor at or about the same time he was; (3) a white female worker was chosen over a female African-American who he sponsored for a promotion; and (4) his supervisor, Mr. Decker, failed to comply with the procedure governing situations where an employee does not pass probation.

As to each, the court found that the alleged action did not establish pretext because: (1) Mr. Perkins's replacement was a Hispanic, who is also a member of a protected class; (2) he conceded that his supervisor, Mr. Decker, "took no known action to remove [the other employee] from his supervisory position," *id.* at 184; (3) his suggested candidate for the promotion was not qualified and he had no evidence that the successful

candidate was also unqualified; and (4) he admitted that the letter regarding his failure to pass probation "appears to comply with the [procedures]." *Id.* at 186.

IV

Mr. Perkins first argues that the Air Force did not meet its burden of establishing a facially nondiscriminatory reason for his demotion. We disagree. At this stage of the *McDonnell Douglas* analysis, the Air Force was required

> merely to articulate through some proof a facially nondiscriminatory reason for the termination; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.*EEOC v. Flasher Co., Inc.*, 986 F.2d 1312, 1316 (10th Cir. 1992).

The district court correctly applied the *McDonnell Douglas* paradigm at this stage of the analysis, and its finding that the Air Force met its burden of coming forward with proof of a facially nondiscriminatory reason for demoting Mr. Perkins is supported by the record.

Having met its burden to articulate a legitimate, nondiscriminatory reason for its adverse employment action, the court correctly held that the burden shifted back to Mr. Perkins to show that the Air Force's stated reasons were a pretext for unlawful discrimination. "To show that the defendant's proffered race-neutral

reasons were actually a pretext for discrimination, this Court has held that the plaintiff must demonstrate that the defendant's proffered race-neutral reasons were so incoherent, weak, inconsistent, or contradictory that a rational factfinder could conclude the reasons were unworthy of belief." *Young*, 468 F.3d at 1250 (internal quotation marks and brackets omitted). Stated otherwise, "[p]retext requires a showing that the tendered reason for the employment decision was not the genuine motivating reason, but rather was a disingenuous or sham reason." *Reynolds v. Sch. Dist. No. 1*, 69 F.3d 1523, 1535 (10th Cir. 1995).

> The relevant inquiry is not whether the defendant's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs. A plaintiff cannot avoid summary judgment with an unadorned claim that a jury might not believe defendant's explanation for his termination; he must point to evidence suggesting that defendant itself did not honestly believe that explanation.*Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1138 (10th Cir. 2004) (internal citation, quotation marks, and brackets omitted).

Although Mr. Perkins disagrees with the Air Force's assessment of his job performance and personality, we agree with the district court that he failed to come forward with evidence sufficient to raise a genuine issue of material fact concerning pretext. As to his argument that the "self-serving," Aplt. Op. Br. at 13, n.3, affidavits and declarations supplied by the Air Force were "suspicious," *id.*, because "they appear to

have been drafted by the same person, using the same language," *id.* n.3, he failed to raise this objection in the district court and this challenge cannot be raised for the first time on appeal. "By failing to object below, any formal defects in the declaration are deemed to be waived." *Thomas v. U.S. Dep't of Energy*, 719 F.2d 342, 344-45, n.3 (10th Cir. 1983).

Finally, we disagree with Mr. Perkins's argument that the district court's finding in its prior order that he "put forth evidence that he was actively misled" Aplt. App. at 118, regarding his appeal rights is evidence of discrimination. Setting aside the fact that Mr. Perkins himself argues that this demonstrates an "active[] conspir[acy] to remove him and deny him due process," Aplt. Op. Br. at 11, - not racial discrimination - we have held that alleged irregularities that occur following adverse action are irrelevant to prove pretext. *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1315 (10th Cir. 2005).

The judgment of the district court is AFFIRMED.

Entered for the Court

David M. Ebel

Circuit Judge

Footnotes

*Michael W. Wynne is substituted for James G. Roche as defendant-appellee pursuant to Fed. R. App. P. 43(c)(2).

**After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Case No. CIV-04-715-M

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FRANKLIN R. PERKINS,
Plaintiff,

v.

UNITED STATES OF AMERICA, ex rel., DR. JAMES G. ROCHE, Secretary, Department of the Air Force,
Defendant.

September 6, 2006, Decided

COUNSEL: For Franklin R Perkins, Plaintiff:Robert L Mitchell, Oklahoma City, OK.

For James G Roche, USA ex rel, Secretary, Department of the Air Force, Defendant: Judy A Copeland, Robert A Bradford, US Attorney's Office-OKC, Oklahoma City, OK.

For Allen B Decker, individually and in his official capacity, Defendant: Judy A Copeland, US Attorney's Office-OKC, Oklahoma City, OK.

JUDGES: VICKI MILES-LaGRANGE, UNITED STATES DISTRICT JUDGE.

OPINION BY: VICKI MILES-LaGRANGE

OPINION

ORDER

Before the Court is "Defendant's Motion for Summary Judgment" [docket no. 71], filed July 3, 2006. On August 8, 2006, Plaintiff filed his response and on August 28, 2006, Defendant filed its reply. The motion has been fully briefed and is now ripe for adjudication.

I INTRODUCTION [1]

Plaintiff Franklin R. Perkins, a civilian employee of the United States Department of the Air Force ("Air Force"), was promoted effective June 30, 2002, to supervisory industrial engineering technician subject to Plaintiff's successful completion of a probationary period of one year. Plaintiff's new immediate supervisor was Allen Decker ("Decker"), branch chief. Plaintiff's relationship with Decker and others including Linda Thomas, employee relations specialist, was difficult, and this difficulty led Mr. Decker to give Plaintiff low marks on his performance evaluation in October of 2002, which, in turn, *inter alia* led to Plaintiff's return to his former position as an industrial engineering technician in November of 2002. Plaintiff asserts that the low evaluation and the demotion were discriminatory in nature and that he immediately notified Mr. Decker's supervisors of his objection to both.

Plaintiff brings this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964. [2] Defendant moves for summary judgment. [3]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" that is "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *19 Solid Waste Dep't Mechs. v. City of Albuquerque, 156 F.3d 1068, 1071-72 (10th Cir. 1998)* (internal citations and quotations omitted). When deciding whether summary judgment is appropriate, the Court views the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in their favor. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202; Simms v. Oklahoma ex rel. Dep't of Mental Health, 165 F.3d 1321, 1326 (10th Cir. 1999).*

At the summary judgment stage the Court's function is not to weigh the evidence, but to determine whether there is a genuine issue of material fact for trial. *Willis v. Midland Risk Ins. Co., 42 F.3d 607, 611 (10th Cir. 1994).* "An issue is genuine if, [viewing the full record] there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998)* (citing *Anderson, 477 U.S. at 248*). "The mere existence of a scintilla of evidence in support of the [Plaintiff]'s position is insufficient to create a dispute of fact that is 'genuine' . . . ." *Lawmaster v. Ward, 125 F.3d 1341, 1347 (10th Cir. 1997).* "An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *See Adler, 144 F.3d at 670* (citing *Anderson, 477 U.S. at 248*). Where the undisputed facts establish that a plaintiff cannot prove an essential element of a cause of

action, defendant is entitled to judgment on that cause of action. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*, cited in *Rocking Chair Enters., LLC v. Macerich SCG Ltd. P'ship, 407 F. Supp. 2d 1263 (W.D. Okla. 2005)*.

III. DISCUSSION

Title VII prohibits an employer from discriminating against an employee on the basis of, among other things, the employee's race, color, national origin, and/or religion. *See 42 U.S.C. § 2000e-2(a)*. A plaintiff alleging discrimination may prove intentional discrimination through either direct evidence of discrimination or indirect evidence of discrimination. *See Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1225 (10th Cir. 2000)*. Where, as here, there is no direct evidence of discrimination, the court applies the three-step, burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. *See Kendrick, 220 F.3d at 1225*.

> Under the *McDonnell Douglas* framework, the plaintiff must carry the initial burden under the statute of establishing a prima facie case of [] discrimination. Once the plaintiff has established a prima facie case, the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for its employment action. If the defendant makes this showing, the plaintiff must then show that the defendant's justification is pretextual.

Kendrick, 220 F.3d at 1226 (internal quotations and citations omitted).

To establish a prima facie case of discriminatory discharge, a plaintiff must show that: (1) he belongs to a protected class; (2) he suffered an adverse employment action; and (3) he had been satisfactorily performing his job. *Watts v. City of Norman, 270 F.3d 1288, 1292 (10th Cir. 2001)*. For purposes of summary judgment, Defendant does not dispute that Plaintiff, an African American, belongs to a protected class. Defendant also does not dispute that Plaintiff was removed from his position as supervisor or that this removal constituted an adverse employment action. Defendant, however, does dispute the remaining element of Plaintiff's prima facie case. Nevertheless, for the purposes of this order, the Court finds analysis of the third element unnecessary and assumes that Plaintiff has established a prima facie case of discriminatory discharge.[4]

Once Plaintiff has established a prima facie case of discrimination, the burden shifts to Defendant to articulate a legitimate, non-discriminatory reason for terminating Plaintiff's employment. *Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)*; *Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978)*.

Defendant asserts Plaintiff was discharged because of his uncooperative demeanor, poor communication skills, and condescending and disrespectful manner of speaking to co-workers. Defendant further asserts that Plaintiff's reaction to the progress review was inappropriate, that he conducted himself poorly in

meetings in that he was rude and disruptive and displayed an unwillingness to follow advice, and that Plaintiff was overly defensive in response to negative feedback. Finally, Defendant asserts Plaintiff's performance on the KC-135 Source of Repair Plan ("SORAP") project was unsatisfactory and that Plaintiff lacked the necessary skills and aptitude for the supervisory position. In light of the foregoing, the Court finds Defendant has met its burden to produce a legitimate, non-discriminatory reason for terminating Plaintiff's employment.

Because Defendant has provided a legitimate, non-discriminatory reason for discharging Plaintiff, the burden shifts to Plaintiff to show that there is a genuine issue of material fact as to whether Defendant's explanation is pretextual. Pretext can be established if the Plaintiff shows either "that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Cmty. Affairs, 450 U.S. at 256* (citation omitted). Also, "[a] plaintiff may show pretext by demonstrating 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999)*(quoting *Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir.1997))*. "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully

discriminated." *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).*

To establish pretext, Plaintiff relies on the fact that he was replaced by a non-black. The Court finds that this does not establish pretext because Plaintiff was replaced by Lonnie Valencia who, as a Hispanic male, also belongs to a protected class. Plaintiff also relies on the fact that he and Bostick were the only African American employees under Decker's supervision and that "both were removed during 2002." The Court finds that this does not establish pretext because, according to Plaintiff, "Decker took no known action to remove Bostick from his supervisory position." Plaintiff's response at 12. Additionally, Plaintiff asserts that he and another supervisor, Michael Clonce, selected people for a GS-0895-11 position for which GS-1152-09's were believed to qualify. Plaintiff selected an African American female and Clonce selected a white female. According to Plaintiff, Decker, Corcoran and another employee determined that GS-1152-09's did not qualify for the position. Subsequently, Plaintiff's selection was disqualified and denied her promotion because of her GS-1152-09 status while Clonce's white employee was retained. The Court finds that this also fails to establish pretext because Plaintiff does not allege or provide evidence to show that Clonce's selection was also a GS-1152-09 and thus disqualified. Finally, Plaintiff asserts that Decker did not comply with the mandatory procedure governing situations where an employee fails to complete the probationary period and directs the Court to paragraph 4.7 of the Air Force Instruction 36-1001. The Court finds that this allegation also fails to establish pretext because Plaintiff admits that the

letter from Decker removing Plaintiff from his supervisory position "appears to comply with the requirements [of paragraph 4.7]."

The Court has carefully reviewed the parties' briefs and evidentiary submissions. Viewing the evidence in the light most favorable to Plaintiff and viewing all reasonable inferences in Plaintiff's favor, as the Court must when addressing a motion for summary judgment, the Court finds Plaintiff has not presented sufficient evidence to create a genuine issue of material fact as to whether Defendant's explanation is pretextual. Specifically, Plaintiff admits that he completed the KC-135 Source Repair Plan after the deadline had expired. Plaintiff submitted emails he exchanged with Larry Mullinax, a fellow employee, and Linda Thomas which also demonstrate the difficulty he was having communicating with fellow employees. Additionally, Plaintiff admits that he did not hear Decker use any specific racial terms. The Court finds that Plaintiff has failed to show any inconsistencies or contradictions in Defendant's proffered reason and that the evidence overwhelmingly supports Defendant's proffered reason, and, thus, there is no genuine issue of material fact to support Plaintiff's claim.

IV. CONCLUSION

For the reasons set forth in detail above, the Court GRANTS Defendant's Motion for Summary Judgment [docket no. 71].

IT IS SO ORDERED this 6th day of September, 2006.

VICKI MILES-LaGRANGE

UNITED STATES DISTRICT JUDGE

Footnotes

1 The following facts are described in the light most favorable to Plaintiff. Immaterial facts or factual averments not supported by the record are omitted.

2 Plaintiff's § 1981, *Fifth Amendment*, and *Fourteenth Amendment* claims were dismissed by this Court's February 16, 2005 Order.

3 Defendant did not seek leave of Court as required by Local Civil Rule 56.1 to file the instant motion, which is Defendant's second motion for summary judgment. While the Court does not condone Defendant's failure to seek leave of Court, it finds that it is proper to consider the instant motion in the interest of judicial economy.

4 The Court, however, would note that the evidence submitted does indicate that Plaintiff was not satisfactorily performing his job.

Date: 3/31/2006
Case No. CIV-04-715-M

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FRANKLIN R. PERKINS,
Plaintiff,

v.

UNITED STATES OF AMERICA, ex rel., DR. JAMES G. ROCHE, Secretary, Department of the Air Force,
Defendant.

ORDER

Before the Court is "Defendant Secretary of the Department of the Air Force's Motion for Summary Judgment" [docket no. 33], filed July 7, 2005. On December 12, 2005, Plaintiff filed his response. The motion has been fully briefed and is now ripe for adjudication.

I INTRODUCTION[1]

Plaintiff Franklin R. Perkins, a civilian employee of the United States Department of the Air Force ("Air Force"), was promoted effective June 30, 2002, to supervisory industrial engineering technician. Plaintiff's new immediate supervisor was Allen Decker, branch chief. Plaintiff's relationship with Mr. Decker was difficult, and this difficulty led Mr. Decker to give Plaintiff low marks on his performance evaluation in

October of 2002, which, in turn, led to Plaintiff's return to his former position as an industrial engineering technician in November of 2002. Plaintiff asserts that the low evaluation and the demotion were discriminatory in nature and that he immediately notified Mr. Decker's supervisors of his objection to both.

In January of 2003, Plaintiff contacted an Equal Employment Opportunity Commission ("EEOC") counselor on another matter and was informed that he had forty-five (45) days to initiate contact with an EEOC counselor after any allegedly discriminatory event or adverse employment action. Plaintiff asserts that this is when he first learned of the forty-five (45) day requirement despite the fact that posters setting forth the requirement were posted in the break room, and that Plaintiff had previously attended an EEOC training block.

Plaintiff contacted an EEOC counselor regarding matters of concern in the instant action in April of 2003. On May 14, 2003, Plaintiff filed an informal EEOC complaint, and on July 21, 2003, Plaintiff filed a formal EEOC complaint citing the October, 2002 evaluation and the November, 2002 demotion. On August 13, 2003, Defendant issued its final decision dismissing Plaintiff's complaint as untimely, and on March 12, 2004, the EEOC affirmed Defendant's decision. Plaintiff brings this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964.[2] Defendant moves for summary judgment on the ground that Perkins failed to properly exhaust his administrative remedies under 29 C.F.R. § 1614.105(a)(1).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" that is "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," 19 Solid Waste Dept Mechanics v. City of Albequerque, 156 F.3d 1068, 1071-72 (10th Cir. 1998) (internal citations and quotations omitted). When deciding whether summary judgment is appropriate, the Court views the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in their favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255; Simms v. Oklahoma ex rel. Dept of Mental Health, 165 F.3d 1321, 1326 (10th Cir. 1999). At the summary judgment stage the Court's function is not to weigh the evidence, but to determine whether there is a genuine issue of material fact for trial. Willis v. Midland Risk Ins. Co., 42 F.3d 607, 611 (10th Cir. 1994). "An issue is genuine if, [viewing the full record] there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998) (citing Anderson, 477 U.S. at 248). "The mere existence of a scintilla of evidence in support of the [Plaintiff]'s position is insufficient to create a dispute of fact that is `genuine' . . . ." Lawmaster v. Ward, 125 F.3d 1341, 1347 (10th Cir. 1997). "An issue of fact is `material' if under the substantive law it is essential to the proper disposition of the claim." See Adler, 144 F.3d at 670 (citing Anderson, 477 U.S. at 248). Where the undisputed facts establish that a plaintiff cannot prove an essential element of a cause of action, defendant is entitled to

judgment on that cause of action. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), cited in Rocking Chair Enters., L.L. C. v. Macerich SCG Ltd. P'ship, 407 F. Supp. 2d 1263 (W.D. Okla. 2005).

III. DISCUSSION

Defendant contends that Plaintiff's Title VII claim must be dismissed for failure to exhaust administrative remedies. Specifically, Defendant asserts that Plaintiff failed to initiate contact with an EEOC counselor within forty-five (45) days of the act giving rise to his claim. Plaintiff asserts that the forty-five (45) day time limit should be extended under the facts of this case.

The Tenth Circuit has held that "exhaustion of administrative remedies is a jurisdictional prerequisite to suit under Title VII." Sizova v. Nat'l Inst. of Standards & Tech., 282 F.3d 1320, 1325 (10th Cir. 2002). Although failure to file an administrative charge prior to filing suit in federal court is a jurisdictional bar, "failure to timely file an administrative charge ... is not jurisdictional ..... Id. Thus, a plaintiff's untimely filing of an administrative charge is not an absolute bar to judicial relief, provided that the plaintiff demonstrates that the expired time should be extended.

Pursuant to EEOC regulations, Plaintiff's complaint will be dismissed as untimely unless he initiated contact with an EEOC counselor within forty-five (45) days of the alleged discriminatory act. 29 C.F.R. § 1614.105(a)(1).[3] Two methods, one mandatory and one discretionary, exist for extending the forty-five (45) day time limit to initiate contact with an EEO counselor. EEO regulations mandate that the forty-five

(45) day time limit shall be extended

> when the individual shows [1] that he or she was not notified of the time limits and was not otherwise aware of them, [2] that he or she did not know and reasonably should not have ... known that the discriminatory matter or personnel action occurred, [3] that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or [4] for other reasons considered sufficient by the agency or the Commission.

29 C.F.R. § 1614.105(a)(2).[4] The EEO regulations also provide for a discretionary extension of the forty-five (45) day time limit under the doctrine of equitable tolling. 29 C.F.R. § 1614.604(c). In the case at bar, Plaintiff alleges that he was discriminated against on two occasions: (1) on October 9, 2002, when he recieved a poor performance evaluation, and (2) on November 7, 2002, when his temporary promotion was rescinded. Plaintiff admits that he first contacted an EEO counselor on April 11, 2003, well after the expiration of the forty-five (45) day time limit prescribed by § 1614.105(a)(1). He argues, however, that the forty-five (45) day time limit should be extended because (1) he was unaware of the time limitation; (2) he did not know discriminatory acts had occurred because he did not know they were discriminatory in nature until several months after they occurred; and (3) there are "other sufficient reasons." Plaintiff also asserts that the doctrine of equitable tolling should apply because he was erroneously informed of his right to appeal the allegedly discriminatory acts.

A. Mandatory Extension of the Time Limit

Plaintiff asserts that he was not aware of the forty-five (45) day time limit and, consequently, falls within the first mandatory exception. Defendant asserts that posters setting forth the requirement to contact an EEOC counselor within forty-five (45) days of a personnel action of concern were posted in Plaintiff's work area and in the break rooms in his building. In his affidavit Plaintiff denies that posters advising of the forth-five (45) day time limit were posted in his immediate work area but admits that such posters were posted in the break room.[5] Defendant also asserts that Plaintiff completed EEOC training in 1998. Plaintiff admits that he received EEOC training but states that it was only introductory in nature and did not provide detailed descriptions of the requirements. Defendant further asserts that Plaintiff knew of the forty-five (45) day time limit because, on January 29, 2003, Plaintiff signed an Election for Alternate Dispute Resolution in another case which included the following statement:

> This is to certify that I have been counseled concerning my rignts for presenting allegations of prohibited discrimination with an EEO Counselor. This includes the fact that I have specifically been told of the 45-calendar [sic] time frame for raising an allegation of prohibited discrimination with a Counselor.

Defendant's Exhibit 11 Attached to its Motion for Summary Judgment. Plaintiff admits that he met with an EEO counselor and was advised of the forty-five (45) day time limit on January 29, 2003. Having carefully

reviewed the parties' submissions, and viewing the evidence in the light most favorable to Plaintiff, the Court finds that the undisputed facts establish that posters setting forth the forty-five (45) day requirement for contacting an EEO counselor were posted in the break room and that Plaintiff was aware of the forty-five (45) day requirement as of January 29, 2003 when he signed the Election of Alternate Dispute Resolution which set forth the requirement. The Court further finds that Plaintiff did not contact an EEO counselor concerning the alleged discrimination that is the subject of the instant action until April, 2003, at least sixty (60) days after January 29, 2003, and more than 120 days after the latest allegedly discriminatory act.

Accordingly, the Court finds that there is no genuine issue of material fact as to whether the first mandatory exception should apply. Specifically, the Court finds that the undisputed facts, taken as a whole, could not lead a rational trier of fact to conclude that as of January 23, 2003, Plaintiff did not know about the forty-five (45) day requirement, or that Plaintiff contacted an EEO counselor within forty-five (45) days of acquiring this knowledge.

Plaintiff asserts that he was not aware of the discriminatory nature of the evaluation and demotion until months after they occurred, and, thus, the second mandatory exception applies. The Tenth Circuit has held that in regard to the accrual of a discrimination claim, " [w]e may presume that many facts will come to light after the date of [a disciplinary action] . . ., and indeed one purpose of a charge and a complaint is to initiate the process of uncovering them, . . . [nevertheless, a plaintiff is] on notice at the moment [of

the personnel action] to inquire whether there was [a] discriminatory motive.'" Hulsey v. Kmart, Inc., 43 F.3d 555, 558 (10th Cir. 1994) (quoting Olson v. Mobil Oil Corp., 904 F.2d 198, 202-03 (4th Cir. 1990)). "[I]t is knowledge of the adverse employment decision itself that triggers the running of the statute of limitations." Id. at 559 (citing Hamilton v. 1st Source Bank, 928 F.2d 86, 88-89 (4th Cir. 1990) ("to the extent that notice enters the analysis, it is notice of the employer's actions, not the notice of a discriminatory effect or motivation, that establishes the commencement of the pertinent filing period.")).

Having carefully reviewed the parties' submissions, and viewing the evidence in the light most favorable to Plaintiff, the Court finds that there is no genuine issue of material fact as to whether the second mandatory exception should apply. Specifically, the Court finds that the undisputed facts show that the acts which Plaintiff alleges were discriminatory occurred in October and November of 2002 and that, based on Hulsey, whether Plaintiff was aware of their discriminatory nature or not is of no consequence.

Plaintiff asserts that the fourth mandatory exception to the forty-five (45) day time limit applies in this case. However, the Court finds that Plaintiff has failed to put forth any evidence or argument regarding any "other reasons considered sufficient by the agency or the Commission." In fact, it is undisputed that both the agency and the EEOC have already determined that the fortyfive (45) day requirement should not be extended in the instant matter. See Defendant's Exhibit 6 Attached to its

Motion for Summary Judgment.

Accordingly, having carefully reviewed the parties' submissions, the Court finds that there is no genuine issue of material fact as to whether the fourth mandatory exception applies. Specifically, the Court fords that the undisputed facts, taken as a whole, could not lead a rational trier of fact to find that there are "other reasons" the agency or the EEOC would have considered sufficient to extend the forty-five (45) day time limit in this matter.

Accordingly, the Court finds that no mandatory extension of time applies in the case at bar.

B. Equitable Tolling

The United States Supreme Court has advised federal courts to apply equitable doctrines, such as equitable tolling, sparingly. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). In the Tenth Circuit, "time limits contained in Title VII will be tolled only where the circumstances of the case rise to a level of `active deception' sufficient to invoke the powers of equity. For instance ... [where] a plaintiff is `actively misled,' or `has in some extraordinary way been prevented from asserting his or her rights.'" Martinex v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984) (citations omitted) (quoting Wilkerson v. Siegfried Ins. Agency, Inc., 683 F.2d 344, 348 (10th Cir. 1982)).

In the case at bar, Defendant asserts that there is no basis for application of the doctrine of equitable tolling. Although Defendant admits it did

not inform Plaintiff of his EEOC rights in its November, 2002 letter, Defendant contends that it was not required to do so and that, as such, the letter is not evidence of active deception on its part. Plaintiff asserts that the letter is evidence that Defendant actively misled him. The letter provides, in pertinent part: "This is not an adverse action and may not be appealed to the Merit System Protect [A]ct. You may contest this action under the Administrative Grievance [S]ystem in AFI 36-1203 if you so desire." Defendant's Exhibit 2, Par. 2 Attached to its Motion for Summary Judgment. Plaintiff further asserts that the Administrative Grievance System instruction to which he was directed does not even apply to Defendant's decision to remove Plaintiff from his supervisory position for failing to satisfactorily complete the probationary period. See Plaintiff's Exhibit A Attached to his Response to Defendant's Motion for Summary Judgment. Subsection E of AFI 36-1203 provides, in pertinent part, that "[a]ny employment matter may be grieved under this procedure except for ... [t]he return of an employee serving a probationary period as a supervisor or manager to a non-supervisory or nonmanagerial position for failure to satisfactorily complete the probationary period." Plaintiff's Exhibit A Attached to his Response to Defendant's Motion for Summary Judgment.

Having carefully considered the parties' submissions, and viewing the evidence in the light most favorable to Plaintiff, the Court finds that there is a genuine issue of material fact as to whether equitable tolling should apply to extend the forty-five (45) day time limit for Plaintiff to contact an

EEO counselor. Specifically, the Court finds that Plaintiff has put forth evidence that he was actively misled. As such, the Court finds that Defendant is not entitled to summary judgment on the issue of Plaintiff's failure to exhaust administrative remedies.

IV. CONCLUSION

For the reasons set forth in detail above, the Court finds that Defendant Secretary of the Department of the Air Force's Motion for Summary Judgment [docket no. 33] should be DENIED. IT IS SO ORDERED this 31st day of March, 2006.

Footnotes

[1]The following facts are described in the light most favorable to Plaintiff. Immaterial facts or factual averments not supported by the record are omitted.

[2]Plaintiff's § 1981, Fifth Amendment, and Fourteenth Amendment claims were dismissed by this Court's February 16, 2005 Order.

[3] This section provides in relevant part, "[a]n aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory. . . ." 29 C.F.R. § 1614.105(a)(1).

[4]Plaintiff does not assert, and presents no evidence to establish, that the third mandatory exception applies.

[5]Plaintiff asserts that he did not frequent the break room but does not assert that he never used the break

room.

Filed October 25, 2007

No. 06-6321
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
FRANKLIN R. PERKINS,
Plaintiff-Appellant,

v.

MICHAEL W. WYNNE, * United States of America, ex rel., Secretary, Department of the Air Force; ALLEN B. DECKER, individually and in his official capacity,
Defendants-Appellees.

ORDER

Before HARTZ, EBEL, and TYMKOVICH, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Civilian Progress Review Statement

***

Frank Perkins

***

Period Covered: 15 Aug -08 Oct 2002

***

1. Progress On Performance Plan Elements
Element 1-Element 7

(Needs significant Improvement)

Comments
*see specific comments on rear of form.
-need a more positive attitude to solve problems
-need a major adjustment in dealing with others
-ask questions, but manner of questions is paramount

2. Cooperation/Responsiveness
-Skilled at working with individuals or groups
-Is an enthusiastic follower
-Is a skilled leader

(Needs significant Improvement)

3. Organizational Skills
-Uses resources effectively
-Sees future problems and heads them off
-Plans and schedules work effectively
-Adapts well to new demands

(Needs significant Improvement)

4. Communication
-Listens well
-Effective in oral communication

-Writes clearly

(Needs significant Improvement)

Comments
-ready e-mail questions
-Answer e-mail questions
-too much rhetoric

5. Duty Performance
-Work of appropriate quality and quantity
-Work is timely

(Needs significant Improvement)

6. Thoroughness
-Complete a job *** to his/her own
Follows up when necessary

(Needs significant Improvement)

Rater: (Supervisor Signature) s/A.B. Decker

8 Oct 2002

Attachment for Civilian Progress Review for Frank Perkins
Item 1:
Duty 1:
-Provide better supervision, delegation, and direction to the MANB planning force
-Know specific planning references and the items under discussion; talking multiple items makes it easy to get subordinates and co-workers and supervisors confused
-Improve work allocations to handle total work taskings

in a better way
-Provide recommendations to solutions rather than surfacing problems.

Duty 2:
-Listen and follow recommendations and guidance of DP employee relations
-Insure all employees are treated fairly under EEO; but uphold discipline standards
-Improve manner when communicating with subordinates
-continue to work improving our labor standards and challenges of DMAP's

Duty 3:
-work better to improve Material issues with and thru SSC
-Make recommendations; Develop long term plans and follow-thru;
-Need more close coordination over material costs and recommended EISP increases.

Duty 4:
-Improve working relations and communications within and without Branch and Div.
-Show more Diplomacy; Don't talk down or try to impress with words or e-mails
-Work suspense in a timelier manner, Perform adequate research before sending E-mail answers.

Duty 5:
-Work with Fixers and sections more closely on Production issues
-Need major help this year with Labor standard reviews and increases;

-Keep E-3 efforts going; Be Proactive on new workloads into branch

Duty 6:
-No changing of performance plans without Branch or Division Planner coordination

Duty 7:
-Make sure planners use PPE while working issues on shop floor
Item 2:
-Need MUCH more Leadership, COOPERATION and SKILL working with others;
Item 3:
-Watch suspense's; More adaptability of "out of box" ideas and thinking!!
Item 4:
-Need much improvement in listening and speaking; answer the questions
Item 5:
-Did not complete – 135 SORAP/botched Driver time effort with – 135 acft Planners
Item 6:
-Learn SORAP process; Timely pursuit of facts and administration/staff correspondence.

Decker Allen B Civ OC-ALC/MANB

From: Thomas Linda J Civ 72 SPTG/DPCEM
Sent: Friday: September 7, 2002 1:47 B
To: Decker Allen B Civ OC–ALC/MANB
Subject: Frank

A. B., I just spoke with James Coil. He states we do not have to do Notice of Improvement Period on a Supv in ProbationaryPeriod He gave me some guidelines and we need to get together next week. Basically, James said just call him in, tell him the specific problems and that right now he is not performing acceptable manner. He has 30 days to improve and if you got ore more complaint, he is being taken off the supervisory position and put back to his old position. We can talk more next week.

LINDA THOMAS
ER SPECIALIST
72 SPTG/DPCEM
(405) 739-2262 / DSN 339-2262

4/2/02
Civilian Performance and Promotion Appraisal Performance Rating

Franklin Perkins

Overall Performance Rating: Excellent: Employee exceeds more than one-half of the critical elements and meets all other elements.

1. Work Effort: Exerts effort and shows initiative in starting, carrying out and completing tasks: spends time effectively performing (Scale of 1-9 = 8: Far Above Fully Successful)

2. Adaptability to Work: Picks up new ideas and procedures quickly: is easy to instruct: can adapt to the demands of new situations; understands and can oral or written instructions (Scale of 1-9 = 9: Outstanding)

3. Problem Solving: Devises effective solutions to problems or identifies effective methods and procedures for accomplishing objectives. (Scale of 1-9 = 9: Outstanding)

4. Working Relationships: Sensitive to the behavior of fellow workers, supervisors, and subordinates; maintains effective working relationship with others. (Scale of 1-9 = 9: Outstanding)

5. Communication: Communicates clearly and effectively; whether orally or in writing. (Scale of 1-9 = 8 : Far Above Fully Successful)

6. Work Productivity: Productive during work time;

completes his/her work projects, duties, and tasks in a timely manner. (Scale of 1-9 = 8 : Far Above Fully Successful)

7. Self-Sufficiency: Works independently with little need for additional supervision or help: follows through well: accomplishes all tasks required to con*** job on his/her own. (Scale of 1-9 = 8 : Far Above Fully Successful)

8. Skill in Work: Performs job-associated tasks well, whether they require physical, technical, professional, supervisory, or managerial skills, is con*** very skillful on the job. (Scale of 1-9 = 7 : Above Fully Successful)

9. Work Management: Effectively plans and organizes work; properly follows or implements management procedures, directives, regulations, or technical ability to direct or evaluate or substitute for absent supervisor. (Scale of 1-9 = 8 : Far Above Fully Successful)

Performance Award Nomination
Award Performance
Award Percentage: 1.29

EVALUATION AND SUBSTANTIATION OF RATING

PE #		(C)Critical/ (N)NonCrit.	Eval *
1	MET	C	M

2	Mr. Perkins is very thorough in reviewing technical data and other applicable data required for developing repairs. He serves as a consultant while implementing major projects. 1,3,9	C	E
3	Mr. Perkins shows initative and is a self starter in his approach to problem solving. 2,5,7	C	E
4	He plans, organizes, and coordinates technical project in an excellent manner. 1,4,5	C	E
5	He exhibits the ability to effectively communicate both orally and in writing. 4,6	C	E
6	MET.	N	M
7	MET.	N	M

*Enter N(Did not meet) M(met) E (Exceeded)

40a

Civilian Rating of ***

Perkins Franklin R
***
4/3/03

Part A. Position Requirements. (Was the employee's performance Unacceptable or Acceptable n the Performance Plan's critical elements?)

Element 1 – 6: Meets

Overall Performance Rating: R – Acceptable: Rated "Meets Standards" on all critical elements

Part C. Awarded Justification (Part B may serve as Part C award justification)

1. No complaints received during this rating period.
2. No complaints received during this rating period. Provided exceptional technical support in technical data review and recommendations provided to cognizant engineering authorities regarding the TF33 Main Fuel Control Cage and Valve Project.
4. No documented counseling sessions required during this rating period.
5. No reprimands required during this rating period.
6. No instances of PPE or safety noncompliance reported during this rating period.

Part D. Performance Award

Award P – Performance

Award Percentage or Amount - $711.00

Rater (Supervisor's signature) s/Michael O. Clonce

Appraisal Factors - Manner of Performance

Appraisal factors listed below represent work behaviors that can be observed in the context of the employee's current position and are considered predictive of performance at the next higher level. Based on your observations of the employee's performance, rate VERY appraisal factor, Use the following scale making the ratings. Place the number (1-9) in the block preceding the factor.

1. Work Effort: Exerts effort and shows initiative in starting, carrying out and completing tasks: spends time effectively performing (Scale of 1-9 = 9: Outstanding)

2. Adaptability to Work: Picks up new ideas and procedures quickly: is easy to instruct: can adapt to the demands of new situations; understands and can oral or written instructions (Scale of 1-9 = 9: Outstanding)

3. Problem Solving: Devises effective solutions to problems or identifies effective methods and procedures for accomplishing objectives. (Scale of 1-9 = 9: Outstanding)

4. Working Relationships: Sensitive to the behavior of fellow workers, supervisors, and subordinates; maintains effective working relationship with others. (Scale of 1-9 = 9: Outstanding)

5. Communication: Communicates clearly and effectively; whether orally or in writing. (Scale of 1-9 =

8 : Far Above Fully Successful)

6. Work Productivity: Productive during work time; completes his/her work projects, duties, and tasks in a timely manner. (Scale of 1-9 = 9: Outstanding)

7. Self-Sufficiency: Works independently with little need for additional supervision or help: follows through well: accomplishes all tasks required to complete job on his/her own. (Scale of 1-9 = 9: Outstanding)

8. Skill in Work: Performs job-associated tasks well, whether they require physical, technical, professional, supervisory, or managerial skills, is considered very skillful on the job. (Scale of 1-9 = 8 : Far Above Fully Successful)

9. Work Management: Effectively plans and organizes work; properly follows or implements management procedures, directives, regulations, or technical ability to direct or evaluate or substitute for absent supervisor. (Scale of 1-9 = 9: Outstanding)

Decker Allen B Civ OC-ALC/MANB

From: Perkins Franklin R Civ OC-ALC/MANBP
Sent: Thursday, October 17, 2002 6:33 AM
To: Decker Allen B Civ OC-ALC/MANB
Subject: RE: 895 Performance Plans

Mr Decker: My performance plan submitted can be modified without any problem. In the superman's class they are instructing that only one plan is to be submitted to the journeyman target grade. It was mentioned previously, I'll make contact with Ms Gibson who is the personnel rep to verify it and submit whatever everyone else is doing. Realistically, we already have Journeymen trainees.

Frank

---Original Message---
From: Allen B Civ OC-ALC/MANB
Sent: Thursday, October 17, 2002 5:58 AM
To: Perkins Franklin R Civ OC-ALC/MANBP; Caban David Civ OC-ALC/MANBP Subject; Fw; 895 Performance Plans

Looks like we have some work to do,
We need to discuss ASAP with Charlotte when all return A. B. Decker

A.B. Decker, Civ, USAF

Chief, Commodities Sheetmetal and Composites Production Branch (MANB) DSN; 336-2684
commerdal: (405) 736-2684
Fax: (405) 734-8437 or DSN FAX 336-6437

---Original Message----
From; Corcoran Charlotte A Civ OC-ALC/MANMP
Sent: Wednesday, October 16, 2002 5:35 PM
To: Decker Allen B Civ OC-ALC/MANB
Subject: 895 Performance Plans

I have reviewed MANBPs performance plans. I believe all of the performance plans need rebuilt. During the Employee Relations seminar on interim appraisals, they were explicit that we could not include anything that pertained to conduct. In my opinion absenteeism end tardiness would be considered conduct issues. They should be excluded from the performance plans. Conduct is separate issue from performance. I know we often question this, but according to Employee Relations, the two must be segregated. I tried to reach Daisy or Linda to confirm and get their opinion, but both are on leave. I also noted that all grades had the same criteria. This must definitely be corrected. We cannot expect trainee to perform to the GS-11 standard. I am in class at Rose State Thursday and Friday, so I will follow up Monday morning.

I had a meeting with all of the planning chiefs on the 30th of September. I thought I made it quite clear that the performance plans would be consistent throughout the division. Everyone agreed to use the performance plans provided by Pat via e-mail. I did note that our template was on the outdated form. I will also validate with Employee Relations if this is a reason to reconstruct them

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